BANK KERJASAMA RAKYAT MALAYSIA v. ZAINUL RIJAL ABU BAKAR & ANOR

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
HASNAH MOHAMMED HASHIM JCA
SURAYA OTHMAN JCA
[CIVIL APPEAL NO: W-02(A)-1179-06-2018]
2 JULY 2020

LEGAL PROFESSION: *Disciplinary proceedings – Complaint against solicitor – Whether complaint satisfied requirements under s. 94(3) of Legal Profession Act 1976 – Disciplinary Board ('DB') disagreed with Disciplinary Committee's ('DC') findings and recommendation that no action be taken against solicitor – Appeal against decision of DB – Whether DB failed to provide reasons for not following findings of DC – Whether gross misrepresentation within scope of misconduct under Legal Profession Act 1976 – Whether there was element of biasness in decision of DB – Whether there was breach of s. 103D(1) of Legal Profession Act 1976*

This appeal originated from a complaint lodged by the appellant, a financial institution, against the first respondent, an advocate and solicitor, to the Disciplinary Board ('DB') of the Bar Council. The DB appointed the Disciplinary Committee ('DC') to investigate the complaint, which was in respect of, *inter alia*, the first respondent's alleged gross disregard of his capacity as the advocate and solicitor for the appellant, to protect the appellant's interest in issuing a letter ('letter of release'), which had caused the appellant financial losses. On 10 May 2008, the appellant had agreed to offer a company ('the borrower') a financing facility in the sum of RM50,000,000. In order to facilitate the legal process of this financing facility, the appellant appointed the first respondent to advise, to prepare and to do the necessary in respect of the facility agreements and security documents. It was an undisputed fact between the parties that the borrower already had existing facilities with Malayan Banking Bhd ('Maybank') which had debentures created over the borrower's fixed and floating charges. Maybank had informed the appellant that it had consented to the creation of specific debenture covering fixed and floating charges over the new plant, equipment and machineries for particleboard production to be financed by the appellant. On 18 March 2009, the first respondent, *vide* a letter advised the appellant permitting the drawdown of the facilities which the appellant duly relied and acted upon. The letter stipulated that the security documents, specifically the memorandum of deposit in respect of cash deposited and charged by the borrower, complied with the appellant's requirements and that the interest of the appellant as lender was fully protected. However, Maybank and Maybank Islamic Bhd filed a claim against the appellant

seeking, *inter alia*, a declaration that the charges that were created by the borrower over its assets in favour of Maybank under the debentures in favour of Maybank which were subsequently vested in Maybank Islamic Bhd rank in priority to the security documents created by the borrower in favour of the appellant including the memorandum of deposit. The High Court held in favour of Maybank and Maybank Islamic Bhd. The appellant appealed against this decision, but the appeal was dismissed. The basis of the appellant's complaint was that the first respondent had failed to obtain the consent from Maybank to exclude the appellant's securities from its debentures. Based on the evidence before them, the DC found that the appellant's complaint against the first respondent did not satisfy the requirements under s. 94(3) of the Legal Profession Act 1976 to constitute 'misconduct' on the part of the first respondent. The DC thenceforth recommended that no action be taken against the first respondent in respect of the complaint. The DB, however, *vide* an order under s. 103D of the LPA, ('order') disagreed with the findings and recommendations of the DC and ordered the first respondent to pay a penalty of RM5,000, failing which the first respondent shall be suspended pursuant to s. 103(1) of the LPA from practising as an advocate and solicitor until payment of the penalty. Dissatisfied with the order of the DB, the first respondent filed an appeal to set aside the order. The High Court Judge ('HCJ') agreed with the submissions of the first respondent and held that the DB's finding of guilt of misconduct under s. 94(3) of the LPA and what purportedly constituted misconduct was not properly reasoned and explained by the DB. Before this court, the appellant submitted that the HCJ had erred in setting aside the DB's decision. The issues that arose were (i) whether there was a breach of natural justice on the part of the DB and/or a breach of s. 103D(1) of the LPA when the DB failed to provide reasons for not following the findings and recommendations of the DC; (ii) whether gross misrepresentation was not within the scope of misconduct under the LPA but fell under the law of tort; and (iii) whether there was an element of biasness in respect of the DB's decision where the DB had already pre-determined a finding of guilt towards the first respondent.

Held (dismissing appeal)
Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:

(1) The DB failed to comply with the mandatory requirement of s. 103D(1) of the LPA. The purported reasons provided by the DB in a letter dated 24 March 2017 was in fact a mere view, a preliminary one at best. A view must be premised on some reasons and explanations or, at the very least, a simple depiction of a thought-process of the DB as to how it arrived at such 'view.' A finding devoid of reason and

explanation was in fact no more than just a plain view. In the total absence of reason, justification or elaboration to support such a view, the mandatory requirement under s. 103D(1) had not been complied with. Thus, the DB's view/finding of gross misrepresentation could not be accepted as a finding of guilt of misconduct under s. 94(3) of the LPA nor constitute the reason for the order of the DB. There was no reason recorded for such rejection by the DB and such failure was a clear breach of s. 103D(1) of the LPA. There was a serious breach of natural justice when the DB failed to furnish reasons for its decision as required by the law. (paras 45-47)

(2) The purported finding of the DB of gross misrepresentation by the first respondent was problematic based on two reasons. First, gross misrepresentation is within the scope of the law of tort. It does not fall within the ambit of the LPA. Secondly, a finding of gross misrepresentation, even if it amounted to a misconduct under the LPA, could not be adequately substantiated by the DB because the DB failed to show the existence of the elements which embody misconduct such as fraud, dishonesty or deceit by the first respondent. The DC was specific in its findings and recommendations when it stated that there was 'no allegation of any defect in character or any morally apprehensive conduct that is unfit as a solicitor' against the first respondent. Thus, when the DB reversed and departed from such findings without any allegation raised towards that effect was questionable. It would be highly indefensible to be in agreement with the finding of guilt of professional misconduct that not only exceeded the scope of the LPA but was not supported by any reason and/or justification whatsoever. (paras 48-50)

(3) Even after the findings and recommendations of no misconduct by the DC, the first respondent was directed to make his representations on why liability should not be found against him before the DB *vide* DB's letter dated 16 May 2017, which was in addition to the DB's letter dated 24 March 2017 referred to earlier where the DB had already made a finding of gross misrepresentation before even hearing the first respondent. Further, the act of one of the members of the DB in instructing the first respondent to submit on mitigation before a finding of guilt served to show biasness. The mitigation was proceeded with even after such instruction was queried by the first respondent. This was a clear indication that the DB had pre-determined the finding of guilt of the first respondent. (paras 51 & 52)

Case(s) referred to:
In Re An Advocate And Solicitor [1950] 1 LNS 106 ***(refd)***
Majlis Peguam Malaysia v. Rajehgopal Velu & Anor [2017] 2 CLJ 493 FC ***(refd)***
Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia [2017] 10 CLJ 36 CA ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 94(3)(n), 103(1), 103D(1), (3), (4)

Other source(s) referred to:
Graham J Graham-Green, *Cordery's Law Relating to Solicitors,* 5th edn, London Butterworths, 1961, p 466

For the appellant - Abdul Rashid Ismail & Azreen Ahmad Rastom; M/s Rashid Zulkifli
For the 1st respondent - Mohamad Haaziq Pillay & Manisha Sugunesegran; M/s J S Pillay & Mohd Haaziq
For the 2nd respondent - Mazura Mohd Amin; M/s Mohanadass Partnership

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: WA-17D-22-07-2017 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Umi Kalthum Abdul Majid JCA:

Introduction

[1] The appellant in this appeal is a financial institution named Bank Kerjasama Rakyat Malaysia.

[2] The first respondent in this appeal is an advocate and solicitor of the High Court in Malaya.

[3] This appeal, which is one of two appeals, arose from the decision of the learned High Court Judge *vide* Originating Summons No. WA-17D-22-07-2017 dated 26 April 2018 which allowed the appeal by the first respondent to set aside the decision of the Disciplinary Board ("DB") of the Bar Council dated 17 June 2017 in finding that the first respondent was guilty of misconduct under s. 94(3)(n) of the Legal Profession Act 1976 ("LPA").

[4] Aggrieved with the aforesaid decision, the appellant herein filed an appeal to this court.

[5] The other appeal was filed by the Bar Council in Civil Appeal W-02(A)-1151-05-2018. When the two appeals were called up for hearing on 18 July 2019, this court was informed that the Bar Council had withdrawn its appeal. This court then gave the appellant's learned counsel the opportunity to seek further instructions from their client in light of the Bar Council's withdrawal of its appeal. However, on the instructions of the appellant at the next hearing date, this court heard fully the appellant's appeal with no participation, other than as a nominal second respondent, by the Bar Council.

[6] For the purpose of this appeal, the parties shall be referred to as they were at this court, that is, as the appellant and the first and second respondents respectively.

Background Facts

[7] This appeal originated from a complaint lodged by the appellant against the first respondent on 4 June 2015 to the DB. The DB appointed a Disciplinary Committee ("DC") to investigate the complaint. The complaint was in respect of, *inter alia*, the first respondent's alleged gross disregard of his capacity as the advocate and solicitor for the appellant, to protect the appellant's interest in issuing a letter dated 18 March 2009 ("letter of release"). The appellant contended that the alleged gross disregard had caused the appellant losses in the sum of RM14,168,976.38.

[8] The background facts of the complaint can be gleaned from the Disciplinary Committee Report dated 31 October 2016 ("the DC Report"). The DC Report stated that on 10 May 2008, a company by the name of Instyle Furniture Sdn Bhd ("the borrower") had applied for a financing facility from the appellant. The appellant then agreed to offer the borrower a financing facility in the sum of RM50,000,000.

[9] In order to facilitate the legal process of this financing facility, the appellant appointed the first respondent to advise, to prepare and to do the necessary in respect of the facility agreements and security documents.

[10] It is also an undisputed fact between the parties that the borrower already had existing facilities with Malayan Banking Bhd ("Maybank") which had debentures created over the borrower's fixed and floating charges.

[11] On 12 January 2009, the first respondent wrote to Maybank to seek its consent for the appellant to create the following securities:

(i) fixed first legal charge over four parcels of land in Muar, Johor;

(ii) cash deposit by way of memorandum of deposit on Sijil Pelaburan Bank Rakyat ("SPBR") amounting to at least RM 14.9 million;

(iii) letter of set-off on the SPBR;

(iv) specific debentures covering fixed and floating charge over plant, equipment and machineries for particle board to be financed by the appellant;

(v) deed of assignment of all rights, interests and benefits of designated accounts; and

(vi) sinking fund of RM 100,000 to be collected on a monthly basis from the date of the first disbursement up to RM3.7 million.

[12] On 15 January 2009, Maybank informed the appellant that it had consented to the creation of specific debenture covering fixed and floating charge over the new plant, equipment and machineries for particle board production to be financed by the appellant.

[13] On 18 March 2009, the first respondent, *vide* letter of even date ("the letter"), advised the appellant permitting the drawdown of the facilities which the appellant duly relied and acted upon. The letter stipulated that the security documents, specifically the memorandum of deposit dated 4 March 2009 in respect of cash deposited and charged by the borrower, had complied with the appellant's requirements and that the interest of the appellant as lender was fully protected.

[14] The letter formed the basis of the appellant's complaint to the DB. The appellant was of the view that the letter assured the appellant that the security documents, specifically the memorandum of deposit dated 4 March 2009 in respect of the cash deposited and charged by the borrower, had complied with the appellant's requirements. Thus, ensuring the appellant's interest was well protected.

[15] On the contrary, *vide* Originating Summons No. 24NCC-68-02-2015, Maybank and Maybank Islamic Bhd filed a claim against the appellant seeking *inter alia*, a declaration that the charges that were created by the borrower over its assets in favour of Maybank under the debentures in favour of Maybank which were subsequently vested in Maybank Islamic Bhd rank in priority to the security documents created by the borrower in favour of the appellant including the memorandum of deposit dated 4 March 2009.

[16] The learned High Court Judge in Originating Summons No. 24NCC 68-02-2015 held in favour of Maybank and Maybank Islamic Bhd and specifically, the learned High Court Judge held that the Maybank and the Maybank Islamic Bhd's debentures had ranked in priority to the security documents created by the borrower in favour of the appellant including the cash deposits. The appellant appealed against this decision to this court and the appeal was dismissed on 2 June 2016.

[17] The basis of the appellant's complaint against the first respondent was that the first respondent had failed to obtain the consent from Maybank to exclude the appellant's securities from its debentures. At the hearing of the DC, the learned counsel for the first respondent argued that the alleged misconduct committed by the first respondent did not come under the purview of s. 94(3) of the LPA. The alleged misconduct was at best a mere negligence and should not come under "misconduct" as per s. 94(3) of the LPA.

[18] Learned counsel for the appellant on the other hand argued that the first respondent had wrongfully represented to the appellant and failed to protect the interest of the appellant. Thus, such failure would amount to "gross disregard" of the appellant's interest under s. 94(3) of the LPA.

[19] However, based on the evidence before them, the DC found that the appellant's complaint against the first respondent did not satisfy the requirements under s. 94(3) of the LPA to constitute "misconduct" on the part of the first respondent.

[20] The DC was of the view that the complaint lacked any allegation of dishonesty or fraudulent conduct by the first respondent, and there was also "no allegation suggesting any defect in character or morally apprehensive conduct that is unfit as a solicitor by the first respondent", that formed part of the requirements under s. 94(3) of the LPA.

[21] In addition to that, the DC was also of the view that the alleged gross misconduct in the complaint might at its highest (but by no means constituting a finding by the DC) support a claim of negligence. As such, the complaint fell outside the purview of the DC since there is no misconduct as alleged in the said letter. The DC thenceforth recommended that no action be taken against the first respondent in respect of the complaint.

[22] The DB, however, *vide* an order under s. 103D of the LPA dated 17 June 2017 ("the order"), after giving the first respondent an opportunity to be heard, disagreed with the findings and recommendations of the DC. The DB then ordered the first respondent to pay a penalty of RM5,000, payable to the discipline fund within one month from the date of the order failing which the first respondent shall be suspended pursuant to s. 103(1) of the LPA from practicing as an advocate and solicitor until payment of the penalty. It is to be noted that the DB, before making the order, had stated *vide* its letter dated 24 March 2017 to the first respondent (but before hearing the first respondent) that it "was of the view that the advice given (by the first respondent to the appellant) was a gross misrepresentation of the consent given" by Maybank and gave notice to the first respondent to appear before the DB on the assigned date pursuant to s. 103D(3) and s. 103D(4) of the LPA.

At The High Court

[23] Dissatisfied with the order made by the DB, the first respondent *vide* Originating Summons No. WA-17D-22-07-2017 ("the High Court proceedings") (the basis of this present appeal) filed an appeal to set aside the Order. The Bar Council was allowed to be the intervener in the High Court proceedings.

[24] The main contention of the first respondent was that the DB had rejected the DC's findings and recommendations of no action to be taken without providing any reasons and/or justifications at all. The first respondent submitted that such failure was contrary to s. 103D(1) of the LPA.

[25] The appellant and the Bar Council, acting as the intervener, submitted that the DB was correct in its decision and that the DB was not bound by the findings and recommendations made by the DC.

[26] The learned High Court Judge agreed with the submissions of the first respondent (the appellant at the High Court) and held that the DB's finding of guilt of misconduct under s. 94(3) of the LPA and what purportedly constituted misconduct was not properly reasoned and explained by the DB.

[27] The learned High Court Judge further found that the statement made by the DB in its letter dated 24 March 2017 purportedly stating the reason for its decision was not a proper reason as envisaged by s. 103D(1) of the LPA. Failure to record reasons to support the decision of the DB was held to be in breach of s. 103D(1) of the Act. Further, the DB's statement that the first respondent was guilty of gross misrepresentation was flawed because gross misrepresentation does not fall within the purview of professional misconduct. Instead it falls under the law of tort. The learned High Court further agreed with the first respondent's submission that there was no fairness at all from the DB because the DB had wanted to hear mitigation without first finding the first respondent guilty, which showed that the DB had pre-determined the complaint.

The Appeal

[28] Before us, the appellant submitted that the learned High Court Judge had erred in setting aside the DB's decision and the appellant premised its arguments on the following grounds:

(i) the DB was correct to have found the first respondent guilty of misconduct;

(ii) the DB had recorded and furnished the reasons to the first respondent in finding the first respondent guilty of misconduct; and

(iii) there was no bias by the DB and it had acted in accordance with the applicable rules and procedures.

[29] The appellant argued that the first respondent had a duty of care to warn the appellant of foreseeable risks associated with the facilities and the securities to be created under the circumstances. The first respondent, as the solicitor retained in respect of this transaction, knew that the appellant would

be relying on the first respondent to provide it with accurate and proper advice. Thus, the appellant submitted that the first respondent's advice was clearly a gross misrepresentation of the position taken by Maybank and the appellant's interests were not protected.

[30] Following that, the appellant submitted that the DB was correct in departing from the findings and recommendations of the DC. The appellant submitted that in doing so, the DB had clearly stated, in the DB's letter to the first respondent dated 24 March 2017 giving notice to the first respondent under s. 103D(3) and s. 103D(4) of the LPA, as follows:

> …The Board disagreed with the finding and recommendation of the Disciplinary Committee on the complaint against you. The Board was of the view that the advice given was gross misrepresentation of the consent given by Malayan Banking Berhad.

[31] The appellant argued that this failure on the part of the first respondent fell within the scope of s. 94(3)(n) of the LPA. The appellant further argued that there is no requirement that there must be deceit or dishonesty under the above-mentioned provision and as such, the imposition of the requirement that there must be deceit or dishonesty before a finding of misconduct alluded to by the learned High Court Judge is erroneous.

[32] The appellant emphasised in its submission that the finding of the learned High Court Judge that the DB had breached s. 103D(1) of the LPA when the DB purportedly failed to furnish reasons for departing from the findings and recommendations of the DC to be erroneous. The appellant submitted that the letter dated 24 March 2017 had furnished the reasons for the DB's decision.

[33] In respect of the issue of pre-determining the guilt and bias against the first respondent, the appellant submitted that all due rules and regulations had been complied with by the DB and the first respondent and his learned counsel had been given enough opportunity to submit before the DB on why the DB ought to follow the findings and recommendations of the DC and on mitigation. The steps taken by the DB was consistent with s. 103D(4) of the LPA.

[34] Further, it was also the contention of the appellant that the DB, as an administrative body, was entitled to prescribe the hearing process and was under no obligation to follow the rules and procedures of a court trial as long as the process and procedures subscribed to were fair, to which in this appeal it was submitted that the proceedings were fair.

[35] The appellant submitted that the learned High Court Judge had erred in his findings when he decided that the DB was biased against the first respondent and when he, the learned judge, decided that the DB had pre-determined his guilt.

[36] Conversely, in contesting this appeal, the first respondent premised his arguments on the following grounds:

(i) there was a breach of natural justice on the part of the DB and/or a breach of s. 103D(1) of the LPA when the DB failed to provide reasons for not following the findings and recommendations of the DC;

(ii) gross misrepresentation is not within the scope of misconduct under the LPA but falls under the law of tort; and

(iii) there was an element of biasness in respect of the DB's decision where the DB had already pre-determined a finding of guilt towards the first respondent.

[37] The first respondent submitted that the failure of the DB to furnish any reason in finding the guilt of the first respondent was a clear breach of natural justice. That the DB had already pre-determined to find the first respondent guilty as the DB had only wanted to hear mitigation without first finding the first respondent guilty.

Our Decision

[38] Section 103D (1) of the LPA provides as follows:

> Consideration by the Disciplinary Board of the report of the Disciplinary Committee
>
> 103D. (1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board **shall record the reason for the rejection.** (emphasis added)

[39] The Federal Court in *Majlis Peguam Malaysia v. Rajehgopal Velu & Anor* [2017] 2 CLJ 493 at p. 513 had dealt with s. 103D(1) and stated as follows:

> [59] We agree that under the current provisions of s. 103D(1) of the LPA, the DB shall record the reasons if it rejects the recommendation made by the DC. It is a mandatory requirement. However, it must be noted that the said requirement was only inserted into the section by an amendment to the LPA vide the Legal Profession (Amendment) Act 2012 (Act A1444) which came into effect on 3 June 2014 vide P.U. (B) 262/2014. There was no indication that the amendment was to take effect retrospectively.

[40] In addition to that, this court's decision in *Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia* [2017] 10 CLJ 36 at p. 50, para. 33, stated as follows:

> … Section 103D has since been amended to require the DB to give reasons where it chooses not to follow the findings and recommendations of the disciplinary committee …

[41] At this juncture, we must point out that two things are clear from the aforementioned line of authorities. First, it is a mandatory requirement for the DB to provide reason should it choose to depart from the DC's findings and recommendations. Second, the amendment to s. 103D(1) is to take effect starting from 3 June 2014. In this appeal, the complaint against the first respondent was lodged on 5 June 2015 and thus, the applicability of this provision to this case was to our mind a non-issue.

[42] We had carefully examined the letter dated 24 March 2017 by the DB in departing from the decision of the DC and the relevant excerpt of the said letter is as follows:

> 1. We write to inform you that the Disciplinary Board has at its meeting held on 13 January 2017 considered the Report of the Disciplinary Committee on the complaint against you. The Board disagreed with the finding and recommendation of the Disciplinary Committee on the complaint against you. The Board was of the view that advice given was gross misrepresentation of the consent given by Malayan Banking Berhad.

[43] It is crystal clear to us that there is a mandatory requirement under s. 103D(1) of the LPA for the DB to furnish reason to the first respondent should it choose to depart from the finding of the DC, which in this appeal purportedly they did. The next question is whether this requirement had been fulfilled by the DB?

[44] To assist us in answering this issue, we then directed our minds to a letter dated 21 August 2017 by the DB that was sent to the first respondent's solicitors when the latter asked for the reason for the rejection of the DC's findings and recommendations. An important excerpt of the aforesaid letter is as follows:

> However, it is pertinent to note that the said provision does not require such reasons to be furnished to the parties.

[45] We were of the view that the DB had in fact failed to comply with the mandatory requirement of s. 103D(1) of the LPA. We were also of the view that the purported reason provided by the DB in the letter dated 24 March 2017 was in fact a mere view, a preliminary one at best. To our minds, a view must be premised on some reasons and explanations or at the very least, a simple depiction of a thought-process of the DB as to how it arrived at such "view". We were mindful that a finding devoid of reason and explanation was in fact no more than just a plain view. In the total absence of reason, justification or elaboration to support such view, the mandatory requirement

under s. 103D(1) had not been complied with. Thus, the DB's view/finding of gross misrepresentation could not be accepted as a finding of guilt of misconduct under s. 94(3) of the LPA nor constitute the reason for the Order of the DB. The DB's letter dated 21 August 2017 only amplified and confirmed its failure on this issue.

[46] We therefore agreed with the learned High Court Judge that there was no reason recorded for such rejection by the DB and such failure was a clear breach of s. 103D(1) of the LPA.

[47] In addition, we were also mindful of the fact that there was a serious breach of natural justice when the DB failed to furnish reason for its decision as required by the law.

[48] Consequently, we were also of the view that the purported finding of the DB of gross misrepresentation by the first respondent was problematic based on two reasons. First, gross misrepresentation is within the scope of the law of tort. It does not however fall within the ambit of the LPA. We refer to *Cordery's Law Relating to Solicitors* by Graham J Graham-Green, 5th edn, London Butterworths, 1961, at p. 466 which states as follows:

> Again, conduct amounting to mere negligence, however gross, is not professional misconduct.

[49] Secondly, a finding of gross misrepresentation, even if it amounts to a misconduct under the LPA, could not be adequately substantiated by the DB because the DB had failed to show the existence of the elements which embody misconduct such as fraud, dishonesty or deceit by the first respondent. We refer to the decision of *In Re An Advocate And Solicitor* [1950] 1 LNS 106; [1950] 1 MLJ 113 where it was held, at pp. 115 to 116 (MLJ), that:

> … In all the cases I have examined where what was involved was the solicitor's relations with his client and where the Courts have held that professional misconduct has existed, there has been present some element of fraud, dishonesty or deceit. I can find no case where the simple failure to do work for which payment has been made or where neglect or even a refusal to pay money where there has been no question of fraud or misappropriation has been held to amount to professional misconduct …

[50] What were the factors that the DB had taken into account in arriving at the finding of gross misrepresentation? The DC was specific in its findings and recommendations when it stated that there was "no allegation of any defect in character or any morally apprehensive conduct that is unfit as a solicitor" against the first respondent. Thus, when the DB reversed and departed from such findings without any allegation raised towards that effect was questionable. In these circumstances, we were of the view that it would be highly indefensible to be in agreement with the finding of guilt of professional misconduct that not only exceeded the scope of the LPA but was not supported by any reason and/or justification whatsoever.

[51] On the issue of the biasness of the DB and on whether the DB had pre-determined the guilt of the first respondent, we were in agreement with the learned High Court Judge that even after the findings and recommendations of no misconduct by the DC, the first respondent was directed to make his representations on why liability should not be found against him before the DB *vide* DB's letter dated 16 May 2017. This 16 May 2017 letter was in addition to the DB's letter dated 24 March 2017 referred to earlier where the DB had already made a finding of gross misrepresentation before even hearing the first respondent.

[52] In addition to that, we were also of the considered view that the act of one of the members of the DB in instructing the first respondent's solicitor to submit on mitigation before a finding of guilt served to show the biasness. The mitigation was proceeded with even after such instruction was queried by the first respondent's solicitor. To our minds, this was a clear indication that the DB had pre-determined the finding of guilt of the first respondent. The first respondent's affidavit affirmed on 26 October 2017 had raised this very issue and this allegation remained unrebutted as the DB had not filed any affidavit to the contrary to rebut the allegation of bias.

Conclusion

[53] Based on the reasons adumbrated above, we were of the unanimous view that the appeal be dismissed with no order as to costs. We were fortified in our decision by the fact that the Bar Council had earlier on withdrawn its appeal against the learned High Court Judge's decision. We therefore saw no cogent reason to disturb the decision of the learned High Court Judge. The deposit of this appeal was to be refunded, if any.